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CURRENT TOPICS.

PROPERTY in the hands of assignees in bankruptcy has been decided by Lowell, J., in the United States District Court of Massachusetts, in *Re Mitchell*, to be liable to taxation under state laws. The tax was resisted by the assignees on the ground that they were officers of the court; that the funds in their hands were in the custody of the law, and, therefore, not to be disturbed or interfered with by any action on behalf of the state. The learned judge remarked that an "able opinion" to this effect had been given by one of the registers in *Re Booth*, 14 N. B. R., and concluded: "I can not subscribe to that opinion. I can see no interference or obstruction of the court, or of the law, in taxing to the owner thereof any fund that may happen to be in whole or partly in the registry of the court, or under its direction, as was the case with money here, provided there is no attempt to affix upon it a lien, or in some way to disturb the actual custody of the fund. Such an assessment is merely an official declaration that the owner of the fund should pay his share of the public burdens. I do not know why a ship in the hands of the marshal should escape taxation to the owner, though, undoubtedly, it will be free from levy or seizure as long as it remains in his official possession. If the state undertook to tax an assignee in bankruptcy as such, that is, to tax his office and franchise—his right to exercise a function under the laws of the United States—or in any mode to discriminate against an assignee, or against the estate of a bankrupt, very different considerations might arise. It is said the assignee is an officer of the court; and so he is, in a certain sense, and so is every attorney who practices in the court; and this will protect them from taxation as such officers, but not necessarily in respect to funds which they are to administer for private persons, though their administration should be under the control of the court."

THE report of the Dean of Harvard Law School for the past year, shows that institution to be in a flourishing condition. The whole number of students connected with the school during the year was one hundred and ninety-nine, two more than during the previous year. The fact that there has been no falling off, but, on the contrary, an increase in the number of students, is exceedingly gratifying, when it is remembered that the course has recently been extended from two to three years, and an examination for admission instituted. Professor Langdell criticises with some severity the action of the New York Court of Appeals, in the adoption of the new rules to which we have before referred, as to admission to the bar in that state, and points out with force their injustice in discriminating against law schools outside of that state. The report concludes with a reference to the difficulties which attend an examination of students on legal subjects, which, it is to be hoped, may be brought to the attention of those committees of practicing lawyers who have charge of the examinations for admission to the bar in many states. "The whole field of law," he says, "is so extensive, and so much of it is unfit for the purposes of systematic study and instruction, that one who attempts to cultivate the whole of it indiscriminately will not cultivate any of it to much purpose. Hence, an examiner who examines without reference to any particular course of study or instruction (and such is the character of nearly all examinations for admission to the profession) can have no other standard than the state of his own knowledge; and the success of the persons examined may, therefore, depend less upon what they know than upon what the examiner knows. It is impossible that such examinations should be at once rigorous and just. They must either admit the undeserving or reject the deserving; and in the long run they will be sure to do the former." Coming from the head of the leading law school of the continent, these suggestions are entitled to great consideration.

AN interesting and exhaustive discussion of the question of maritime liens is to be found in a recent decision of Brown, J., of the United States District Court for the Eastern District of Michigan, in the case of *The Benton*, 3 Mich. Law., 128. In this case, where a firm of material-men of three members, libeled a vessel, in which two members of the firm owned an interest, it was held that the suit could not be maintained. The only case, says the judge,

that indicates the possibility of a material-man having a lien upon his own ship—that of Foster v. The Steamboat Pilot, No. 2, Newberry, 215, in which seamen, who were also part owners, were permitted to libel their own vessel for wages, after sale upon execution against them from a state court—was promptly reversed on appeal by Mr. Justice Grier in a clear and forcible opinion, (2 Wall. Jr., 592), though the learned judge refused to decide how far a part owner might have a lien upon the shares of his co-owners for advances made or services performed. Not only is the enforcement of the lien against one's own property open to the objection that a man can not sue himself at law, but to the further objection that he ought not to compel his creditors to pay debts which he has contracted and become himself obligated to pay. Part owners are liable *in solido* for necessaries. 1 Pars. on Shipping, 100. That a material-man has no lien upon his own property has been decided, not only in admiralty, but in cases under the mechanics' lien laws of the several states. Logan v. The Steamboat Æolian, 1 Bond, 267; Phillips on Mechanics' Liens, sec. 39; Babb v. Reed, 5 Rawle, 151; Stevenson v. Stonehill, 5 Whar. 301; Peck v. Brummagim, 31 Cal. 440. In the case of The St. Joseph, Brown's Admiralty, 202, it was held that the fact that the libelant was the general agent and superintendent of the line of boats of which the respondent vessel was one, and held sixty thousand dollars of stock of the company, was sufficient proof of his having given credit to the company and not to the vessel. Has a part owner of a ship a lien upon the shares of his co-owners? In Doddington v. Hallett, 1 Ves. Sr., 497, Lord Hardwicke decided that he had, but the case was overruled by Lord Eldon in *ex parte* Young, 2 Ves. and B., 242, and after some conflict of authority in New York, the law of England and the United States is now firmly pronounced against the existence of such lien. 1 Pars. on Ship., 114; Patten v. The Schooner Randolph, Gilp. 457; Hall v. Hudson, 2 Sprague, 65; The Larch, 2 Curt. 427, reversing same case, 3 Ware, 28; Macey v. DeWolf, 3 W. & M. 205; Mumford v. Nichol, 20 Johns. 611; Green v. Briggs, 6 Hare, 395; Lamb v. Durant, 12 Mass. 54; Merrill v. Bartlett, 6 Peck, 46; Berdan v. Gardner, 4 ib. 456; French v. Price, 24 do. 14; 1 Pars. on Ship. 114. A court of admiralty has no power to entertain a libel for an account between part owners. Hall v. Hudson, 2 Sprague, 66; The Marengo, 1 Low. 52; The Steamboat Orleans v. Phoebus, 11 Pet. 175; Minturn v. Maynard, 17 How. 477; Grant v. Poillou, 20 ib. 162; Kellum v. Emerson, 2 Curt. 79; Ward v. Thompson, 22 How. 330; 1 Pars. on Ship. 116.

THE rule of law that no action can be maintained by one partner against the other for any cause growing out of the partnership relation, or which requires an accounting to ascertain the respective rights and liabilities of the parties, is subject to some limitations. In *Medge v. Puig*, decided last month in the New York Court of Appeals, a contract had been entered into between the parties constituting them partners in respect of the business contemplated to be carried on under it, and containing certain stipulations to be performed by the several parties for the benefit of the others. For their proportion of the capital stock of the partnership, the defendants expressly stipulated by the instrument to do and perform certain things, and not to do and perform certain other things, and the plaintiff, on his part, stipulated to do and perform certain things. The plaintiff brought an action alleging that the defendants had been guilty of various breaches of the contract on their part, in not doing and performing the several things stipulated to be done by them by the terms of the agreement, and in doing certain other things which they stipulated not to do. It was objected that such an action between partners would not lie, but the court held that it would. In Glover v. Tuck, 24 Wend. 153, 158, Cowen, J., says that the objection that the articles of agreement between the plaintiff and defendant constitute a partnership in consequence of which the plaintiff's remedy lies in a court of equity, is thus answered by Collyer on Partnership, 132 Am. ed. 139: "One partner may maintain an action of covenant against his co-partner, whether the covenant be to pay any sum or do any action for the purpose of only launching the partnership, or whether it be to perform any of the articles after the partnership has commenced. An action of covenant will lie, although there may be accounts between the parties which require unraveling in equity. And where the partnership covenants have not been infringed for any length of time, the action of covenant

is the proper remedy." "I have examined," says the learned judge, "the leading cases cited by him (Collyer), and find that his doctrine is clearly sustained by the English authorities, and there is no case in this state, I apprehend, which trenches upon it in the least." See Townsend v. Goewey, 19 Wend. 424; Musier v. Trumpbour, 5 Wend. 274; and other cases cited in Glover v. Tuck. In Bagley v. Smith, 10 N. Y. 489, it was held that an action would lie upon a covenant contained in partnership articles; and, in Wills v. Simmonds, 8 Hun. 189, that, although the partnership relation may exist between the parties, the court has jurisdiction to entertain a suit at law brought by one against another partner, where the action involved an inquiry only with respect to the damages that the plaintiff sustained because of an alleged breach of the co-partnership agreement by the defendant. In Paine v. Thacher, 25 Wend. 450, the court held that an action would lie by one partner against another upon an express promise to pay a certain share out of his partnership profits for extra services. These cases establish with clearness the right of one partner to maintain an action for any breach, on the part of another partner, of the contract which establishes the partnership relation.

THE LIABILITY OF RAILROAD COMPANIES IN MISSOURI FOR KILLING STOCK. II.

8. *Failing to ring the bell or sound the whistle.*—For neglecting to ring the bell or sound the whistle before crossing any public road or street, as required by the statute, the company is liable to a penalty of $20, and for all damages which shall be sustained by any person by reason of such neglect. 1 W. S. 310, § 38.

It would probably be the duty of the company to give timely warning when a train is approaching a public crossing, but whether its failure to do so would be negligence, in the absence of any statute requiring it, would depend on the situation and circumstances connected with the crossing. 33 Ind. 335; Cordell v. N. Y. C. & H. R. R. R. Co., 64 N. Y. 535. But as the statute requires the company to signal the approach of a train before crossing a public road, by ringing the bell or blowing the whistle, its failure to do so is held to be negligence *per se*, and such negligence, with proof that stock was killed at the crossing, make out a *prima facie* case for the plaintiff, without further evidence that such negligence caused the injury, and cast the *onus* on the defendant to show in rebuttal that the plaintiff's own negligence contributed, or the injury was not caused by such neglect of duty on the part of the company. Howenstein v. Pacific R. R. Co., 55 Mo. 33; Owens v. H. & St. Jo. R. R. Co., 58 Mo. 386. And here again, before the ink with which this doctrine is announced is dry on the paper, the same court declares that, although the failure of the company to give the proper signal on approaching a road-crossing is negligence *per se*, yet it must be shown that the injury was the result of such negligence; that is, in addition to proving such negligence, and that the animal was injured at the crossing, the plaintiff must prove that the injury was caused by such negligence, either by direct evidence or by proving facts and circumstances from which it may be fairly and rationally determined; and, in the absence of such evidence, the plaintiff can not recover. Holman v. C. R. I. & P. R. R. Co., 62 Mo. 562; Stoneman v. A. & P. R. R. Co., 58 Mo. 503; Karle v. K. C., St. Jo. & C. B. R. R. Co., 55 Mo. 476. See also Harlan v. St. L., K. C. & N. R. R. Co., 64 Mo. 480; Fletcher v. A. & P. R. R. Co., 64 Mo. 484; Cordell v. N. Y. C. & H. R. R. R. Co., 64 N. Y. 535.

This is the true rule. The statute makes the company liable for damages sustained by reason of the failure to give such warning; hence, as in a suit under § 43, the plaintiff must show that the injury complained of was caused by such failure, etc. If the plaintiff relies upon the negligence of the company, in omitting to ring the bell or sound the whistle, he must set it up in his petition or statement. Meyer v. A. & P. R. R. Co., 64 Mo. 542. Double damages can not be recovered in a suit founded on § 38. 55 Mo. 33; 54 Mo. 240; 60 Mo. 567. Nor can interest be allowed on the damages sustained. 64 Mo. 542; 63 Mo. 99, 367.

9. *Negligence.*—A railroad company is not liable for killing or injuring stock coming upon the track where the road is fenced, or where it is not bound to fence, unless such injury is caused by the negligence of the company or its agents, and the *onus* is upon the plaintiff to prove such negligence. McPheeters v. H. & St. Jo. R. R. Co., 45 Mo. 22; Musick v. A. & P. R. R. Co., 57 Mo. 134; 60 Mo. 405. In view of the dangerous means and instruments

employed in operating a railroad, the company is held to the exercise of proportionate skill and care to prevent the destruction of property or other injuries. 26 Mo. 441; 36 Mo. 351; 28 Wis. 487.

The performance of every duty enjoined by statute, as making fences, road-crossings, cattle-guards, erecting signals, ringing the bell, and sounding the whistle, is not the whole duty of a railroad company; its agents must use such additional care to avoid injuring others as common prudence would dictate in the various conditions and circumstances in which they may be acting, and a failure to do so is negligence, for which the company is responsible. Hicks v. Pacific R. R. Co., 64 Mo. 430. On the other hand, a person of ordinary intelligence is bound to know that a railroad crossing over a public highway, where cars are likely to pass and are frequently passing, is a place of more than ordinary danger, and, before attempting to cross, it is his duty to stop and look both ways and listen for approaching trains. 61 Penn. St. 361; 56 Penn. St. 280. He must, at least, use due care in looking for the cars before he attempts to cross. 72 Penn. St. 27; 47 N. Y. 400; 35 N. Y. 75; 55 Ill. 379; 29 Iowa, 55; 64 Mo. 480, 484. If he sees a train, and determines to try the speed of his horses against that of the engine, he does it at his own peril. 29 N. Y. 315. Or if, on approaching a crossing with a team, he does not avail himself of his sense of sight and hearing, when, by the proper exercise of it, he could avoid a collision, he will be regarded as unusually negligent, though the bell may not be rung or the whistle sounded; if he could have seen the cars, had he looked, in time to avoid the injury, and did not, he is guilty of contributory negligence, and can not recover. 40 Ill. 218; 39 N. Y. 358; 34 Iowa, 153; 33 Ind. 335; 55 Penn. St. 396; 64 Mo. 484, 480.

10. *Where there is contributory negligence.*—It is the general principle that, where there is mutual fault or negligence contributing directly or proximately to the accident, neither party can recover. 31 Mo. 411; 34 Mo. 55; 40 Mo. 131. But if the negligence of the injured party was not the proximate cause of, or did not contribute directly to the injury, the party whose fault was the direct and proximate cause thereof would be liable. 45 Mo. 255. So, if the plaintiff's negligence was slight or remote, and the defendant might have avoided the injury by the exercise of reasonable care and prudence, he is not excused. 36 Mo. 351, 484; 40 Mo. 153, 506; 42 Mo. 79; 43 Mo. 380, 523; 45 Mo. 322; 27 Mo. 95; Hicks v. Pacific R. R. Co., 64 Mo. 430.

In a few cases the Supreme Court has gone farther, and held that, although the plaintiff may have been guilty of negligence which contributed directly to the accident, yet, if the defendant could have prevented the injury by the exercise of ordinary care, it is liable. Brown v. H. & St. Jo. R. R. Co., 60 Mo. 461; Meyers v. R. I. & P. R. R. Co., 59 Mo. 223. There are other cases inclining to the same doctrine, though, upon careful examination of them, I am not prepared to say that they so decide. Karle v. K. C., St. Jo. & C. B. R. R. Co., 55 Mo. 476; Isabel v. R. R. Co., 60 Mo. 475; 43 Mo. 380; 64 Mo. 430. But the law, as laid down in Shearman & Redfield on Negligence, chap. 3, § 25, has been fully indorsed by that court, which is, that where the plaintiff has been guilty of negligence which proximately contributed to produce the injury, so that, but for his concurring and co-operating fault the injury would not have happened, he can not recover, except where the more proximate cause of the injury is the omission of the defendant, *after becoming aware of the danger* to which the plaintiff is exposed, to use a proper degree of care to avoid injuring him. Karle v. K. C., St. Jo. & C. B. R. R. Co., 55 Mo. 476; Maher v. A. & P. R. R. Co., 64 Mo. 267; 60 Mo. 475; Bell. R. R. Co. v. Hunter, 33 Ind. 335.

Here the important fact of notice or knowledge on the part of the defendant of plaintiff's danger is deemed essential to the plaintiff's right to recover, while in the cases of Meyers and Brown, *supra*, it is overlooked or ignored. This doctrine is in harmony with the general principle, that no one can hold another responsible for an injury which he was equally instrumental in bringing about, or to which his own fault or negligence directly contributed. When both parties are guilty of wrong or negligence, but neither anticipates harm to another as the result thereof, there should be no liability between them, and neither can be called upon to repair the other's loss. To say that the defendant is liable notwithstanding the plaintiff's negligence, if, by the exercise of ordinary care it could have avoided the injury, is, in

effect, to hold it liable for an injury to which its negligence was only contributory. If, by the use of ordinary care on the part of the defendant, the injury could have been avoided, then, but for the fault of the defendant it would not have happened; therefore the defendant caused the injury and must pay for it. But, if the plaintiff was negligent, the same theory will apply to his negligence, and as he caused the injury, he should not recover. Hence the principle that, where there is mutual fault or contributory negligence, neither party shall recover. But if the defendant is aware of the plaintiff's danger, and could, by proper care, avoid hurting him, and does not, his conduct would evince a willingness to inflict the injury, or imply a disregard of consequences, and the plaintiff may recover, though he be a trespasser, or be guilty of negligence contributory to the accident. Bell. R. R. Co. v. Hunter, 33 Ind. 335; 26 Ind. 76; 47 Ill. 408.

What constitutes negligence, and whether it be proximate and contributory to a given result, depends so much upon the attending circumstances of the case and the peculiar notions of different judges as to the relative duties and obligations of individuals, that much confusion and contradiction exist in the reported cases, and no general or universal rule can be laid down as the settled law of the land. The following propositions, however, are deducible from the authorities, and may be considered as settled law:

(1.) That a party seeking to recover for injuries occasioned by the negligence of another, must be shown to be himself free from negligence contributory to the injury complained of, or, if not, that the defendant could have avoided the injury by the exercise of ordinary care after becoming aware of plaintiff's danger.

(2.) That where the defendant's negligence was the proximate cause of the injury, and the negligence of the plaintiff was only slight or remote and did not contribute directly to the injury, he may recover.

(3.) A person attempting to cross a railroad, whether alone or with a team or with stock, must make use of his ordinary faculties to ascertain if there is danger in the attempt, or he will be held guilty of negligence.

(4.) Where the facts are uncontroverted, the question whether they amount to negligence, or to contributory negligence, is one to be determined by the court; but when the question of negligence, or contributory negligence, depends on conflicting evidence, or inferences to be deduced from a variety of circumstances, in regard to which there is room for fair differences of opinion among intelligent men, it should be submitted to the jury under proper instructions. In other words, ordinarily the question of negligence is a mixed question of law and fact, and should be submitted to the jury, under proper instructions, when there is any evidence from which it may be fairly and rationally deduced. 50 Mo. 461; 55 Mo. 476, 485; 64 Mo. 480, 484; 38 N. Y. 49, 440.

(5.) Where the negligence of the defendant, by which the plaintiff was injured, is established, and the plaintiff was not guilty of contributory negligence on his part, the negligence of a third person contributing to the injury furnishes no excuse for the negligence of the defendant, and no reason why he should not respond in damages. Webster v. H. R. R. Co., 38 N. Y. 260; 36 N. Y. 39; Robinson v. N. Y. C. & H. R. R. R. Co., 66 N. Y. 11; Slater v. Mersereau, 64 N. Y. 138. H. S. K.

CONTRIBUTORY NEGLIGENCE.

BALTIMORE & POTOMAC R. R. v. JONES.

Supreme Court of the United States, October Term 1877.

PLAINTIFF, a laborer in the employ of defendant, when about to leave the place where he was working, on one of defendant's trains, was told by the person superintending him, who was also conductor of the train, to get on anywhere, as the train was in a hurry to leave. Plaintiff got on the pilot of the locomotive, which was a dangerous place to ride. While on the trip he was injured by a collision between the locomotive and some other cars of defendant, caused by defendant's negligence. The proper place for plaintiff to ride was in a box-car on the train provided for the employees; he had been told previously to always ride there and had been forbidden riding on the pilot of the locomotive. No one of those in the box-car was injured, and plaintiff would not have been if he had ridden there. *Held*, that plaintiff was guilty of contributory negligence and could not recover of the defendant for the injury.

In error to the Supreme Court of the United States for the District of Columbia.

MR. JUSTICE SWAYNE, delivered the opinion of the court:

The defendant in error was the plaintiff in the court below. Upon the trial there he gave evidence to the following effect: For several months prior to the 12th of November, 1872, he was in the service of the company as a day laborer. He was one of the party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was

used for this purpose. At others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connection with the train. On the 12th of November, before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat-cars with dirt and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere, that they were behind time and must hurry. The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body and the other one severely injured. Nobody else was hurt, except two other persons, one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident, a box-car had been assigned to the construction train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car and not on the engine, and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident, without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains and the watchman in the tunnel were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that, on the evening of the accident, the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence having closed, the defendant's counsel asked the court to instruct the jury as follows: "If the jury find from the evidence that the plaintiff knew the box-car was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not." The instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record: 1. The exception touching the admission of evidence. 2. As to the application of the rule relative to injuries by one servant by reason of the negligence of another servant, both being at the time engaged in the same service of a common superior. 3. As to the contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view the point presented by the third is sufficient to dispose of the case.

Negligence is failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, section 1 and notes. One who by negligence has brought an injury upon himself, can not recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is—1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or 2, whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that, but for such negligence or want of care and caution on his part, the misfortune would not have happened. In the former case, the plaintiff is entitled to recover. In the latter he is not. Tuff v. Warman, 5 Scott C. B. N. S. 572; Butterfield v. Forrester, 11 East, 60; Bridge v. G. J. R. R. Co., 3 M. & W. 244; Davies v. Mann, 10 M. & W. 546; Clayards v. Dethic, 12 Q. B. 439; Van Lien v. Scoville Co., 14 Abbott's Pr. N. S. 74; Ince v. East Bost. Co., 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does not appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected and competent for their places. For the purposes of this case we assume that the defendant was guilty of negligence.

The plaintiff had been warned against riding on the pilot and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his

place there, He could have gone into the box-car in as little if not less time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, although bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He, and another who rode beside him, were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. Hickey v. R. R. Co., 14 Allen, 429; Todd v. R. R. Co., 3 Id. 18; s. c., 7 Id. 207; Gavett v. R. R, Co., 16 Gray, 501; Lucas v. R. R. Co., 6 Gray, 64; Ward v. R. R. Co., 2 Abbott's Pr. (N. S.), 411: Galena R. R. v. Yarwood, 15 Ill. 468; Doggett v. R. R., 34 Iowa, 285.

The plaintiff was not entitled to recover. It follows that the court erred in refusing the instructions asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such directions, and error to refuse. Gavett v. R. R. Co., *supra;* Merchants' Bank v. State Bank, 10 Wall. 605; Pleasant v. Fant, 22 Wall. 121.

The judgment of the Supreme Court of the District of Columbia is reversed, and the case will be remanded with directions to issue a *venire de novo*, and proceed in conformity with this opinion.

ACTIONS FOR PERSONAL INJURY—PHYSICAL EXAMINATION OF PLAINTIFF.

SCHROEDER v. CHICAGO, ROCK ISLAND & PACIFIC R. R.

Supreme Court of Iowa, December Term, 1877.

HON. WM. H. SEEVERS, Chief Justice.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS, } Associate Justices.

IN an action for personal injury, where the extent of the injury is in dispute, the defendant is entitled, on motion, to an order of court for the physical examination of plaintiff by physicians.

Appeal from Clinton Circuit Court.

Action to recover for personal injuries sustained by plaintiff while in the employment of defendant, by reason of the negligence of defendant's employees. There was a verdict and judgment for plaintiff; defendant appeals. The facts involved in the questions of law determined by the court are found in the opinion. The case has before been in this court upon a former appeal by defendant. See 41 Iowa, p. 344.

Cook & Richman, for appellant; *W. A. Foster*, for appellee.

BECK, J., delivered the opinion of the court:

Plaintiff, with numerous other men, was employed by defendant in taking down and removing its old railroad bridge across the Mississippi river, between Davenport and Rock Island. The timbers of the bridge were, when taken down, placed upon cars and in that manner transported to a place convenient for depositing them. To reach this place with the train, it was necessary to draw it westward with an engine, and, at a certain point, change it by means of a "switch" to another track, upon which it was "backed" to the place where the load was deposited.

Plaintiff was required by the employee of defendant, under whose direction he was working, to go from the bridge when the train had received its load with it, in order to assist in unloading the timbers. With other men he went upon the train and seated himself upon the timbers. In backing, the timbers upon which he was sitting were thrown off the car and plaintiff himself also was thrown to the ground, the timbers, or some of them, falling upon him. Plaintiff claims that the accident occurred through the negligence of defendant's employees, and that the injuries he received were severe and permanent in their character, and have so far disabled him that he can not engage in employments requiring ordinary strength and vigor.

The issues of the case involved the extent of the injuries inflicted upon plaintiff, and their effect upon his health and strength. He testified upon the first trial that he was so far disabled that he could not engage in labor requiring the exercise of common strength and activity. His testimony was to the effect that his hips and back were the seats of great pain, and that the injuries had impaired his nervous system, and that his limbs and some of his internal organs were to an extent paralyzed. After the jury were empanneled, and before the introduction of any testimony, the defendant filed a written application, asking that a proper order of the court be made requiring the plaintiff to submit to an examination by physicians and surgeons, that they might determine the true condition of his health and character and extent of his ailments, to the end that it might be known whether, indeed, he was suffering from any disability, and if so found, whether it originated from the injuries sustained by the timbers falling upon him as claimed by him in his petition and testimony. The defendant, in its application, asked that such an examination should be made by a proper number of physicians, to be selected, the equal numbers by plaintiff and defendant, and it

was proposed by defendant that its own medical officer should not be one of its number, and that the expenses of such examination would be paid by defendant. In support of this application, the affidavit of a surgeon and physician in the employment of defendant was filed, stating that he had professionally attended plaintiff immediately after he was injured, and had made personal observation of plaintiff's condition and heard his testimony at the former trial, and that it was his belief, based upon these means of knowledge, his injuries were not of the character and extent claimed by him, and that the truth of the matter could be ascertained by a proper personal examination of plaintiff.

This application was resisted by plaintiff by exceptions, and an affidavit of himself, which shows, among other matters, that it was not made until after the jury were sworn; that plaintiff had no witness present, except himself, who could testify to his physical condition, for the reason that the printed testimony of the physicians at the first trial, used in the Supreme Court by consent of both parties, was to be read upon this trial by plaintiff; that a number of physicians were in attendance at the court, through the procurement of defendant, who, plaintiff charged, were interested against him; that plaintiff is not acquainted with physicians in the county where the case was on trial, the venue having been changed from Scott County, and that he is without means to procure the attendance of physicians for the purpose of an examination. It is also alleged in the exceptions, "that the affection from which plaintiff now suffers is a nervous derangement, injuring the bowels, and partial paralysis," and, as shown upon the former trial, an examination would fail to reveal the extent and character of his ailments. The plaintiff further insisted that the court had no authority to order the examination to be made, and no power to enforce such an order if made. The application was overruled, on the ground that defendant was not entitled, as a matter of right, to the order sought.

The plaintiff testified, in the course of the trial, that his back and internal organs of the lower part of the body were affected by the injury, and that one of his legs was disabled to an extent that deprived him of its full use, and that he thought it appeared to be smaller and somewhat shrunken. Upon the cross-examination, after having stated the condition of his leg, he was asked if he was willing to permit his limbs to be examined by physicians. His counsel objected to the question, and the court did not permit it to be propounded to him. These rulings are the subject of separate objections on the part of defendants. As they present substantially the same questions, they may be considered together.

The plaintiff must be regarded as objecting to an examination of the diseased parts of his body by competent physicians and surgeons, although no objection thereto was formally expressed by him. His resistance to the application made by defendant, and his objection to the interrogatory, must be regarded as a refusal on his part to consent to an examination. The first ruling of the court is based upon the ground that it possessed no authority to order the examination as a matter of right possessed by defendant. We are to understand that the like reason controlled the decision upon the competency of the question objected to by defendant. It seems quite clear that if defendant had no right to require plaintiff to submit to the examination of his person, the court rightfully decided in overruling defendant's application. The same is true as to the ruling upon the interrogatory. If the plaintiff had answered the question negatively, or refused to answer, the court could not, in this view of the law, have required an answer, or required plaintiff to submit to the examination; therefore, if the rule recognized by the court is correct, it would have been vain to have ruled differently.

The converse of this proposition must be true, namely: if the defendant was entitled, as a matter of right, to have the person of plaintiff examined, the court possessed the authority and power to order it and enforce its order. This can not be doubted. As to the manner of enforcing the order, we may have something to say hereafter. As the decisions of the court under consideration were based upon the view that defendant could not demand the examination of plaintiff as a matter of right, the soundness of this doctrine must be first considered.

Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth, is unquestioned; it is the correlation of the right to exact justice. It is true, indeed, that on account of the imperfections incident to human nature, perfect truth may not always be attained; and it is well understood that exact justice can not, because of the inability of courts to obtain truth in entire fullness, be always administered. We are often compelled to accept approximate justice as the best that courts can do in the administration of the law. But, while the law is satisfied with approximate justice, where exact justice can not be attained, the courts should recognize no rules which stop at the first when the second is in reach. Those rules, too, which lead nearer the first, should be adopted in preference to others which end at points more remote. This doctrine lies at the foundation of the rules of evidnce, though, it must be confessed, that the superstructure does not always fully conform thereto. Great progress, however, in a comparatively recent period, has been made by legislation and judicial decisions in the work of conforming the system of evidence to this germinal principle. The most notable of the steps in this progress is the abrogation of the rule which precluded parties to actions from giving testimony therein. This rule, however, was mistakenly supposed to be in harmony with the principle just stated. It was believed

that the interest of parties to actions would cause them, as witnesses, to prevent the truth or conceal it. But when it was discovered that, as a rule, this was an erroneous conclusion, legislation was invoked enabling parties to testify. The wisdom of the change has been fully vindicated by experience.

In the case before us, plaintiff claims to recover for injuries sustained on the 6th day of November, 1872; in December, 1874, the first trial was had. He claims in his pleadings, and so testified on the former trial, that the injuries produced permanent disability—the like testimony repeated at the first trial. It quite satisfactorily appeared, by the application of defendant for an order requiring his examination, and the affidavits supporting it, that the full effect of the injuries, and the extent of his disability, could be determined by physicians and surgeons, upon an examination of the body of plaintiff. This, we think, was clearly established by professional testimony given at the trial. It appears that no thorough and careful examination was made by physicians since the first trial; and, indeed, it may be well claimed that no such examination was made at any time after the physicians ceased to attend upon him for his injuries. His testimony at the first trial, as well as at the second, was to the effect that he suffered continually from the injuries, and his disability was of a character that would probably be permanent. Their decision, under the very great preponderance of the evidence, apart from his own testimony, was to the effect that the injuries had wrought no such effect as claimed by plaintiff. The medical witnesses unite in testifying that an examination of his person would reveal almost certainly his true condition. Indeed, the showing made by defendant upon the application for examination, as to the nature of his disease, authorized such conclusion. To our minds, the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other testimony that could have been introduced. The cause of truth—the right administration of the law—demand that he should have produced it. We will consider the objections urged to this view of the case. It hardly appears that the objections urged in the exceptions of plaintiff to defendant's application ought to be here considered, as the court below held none of them good, but decided the point upon the ground that defendant asked for a matter to which it had no right. It is, however, proper to remark that the inability of plaintiff to pay physicians who should make the examination, was no impediment to the order, as defendant proposed to furnish the means required. The facts that the application was made after the jury was sworn, and plaintiff knew no physicians in the county of the trial, do not appear to be well-founded objections to allowing the order, for it does not appear that ample time could not have been allowed by the court for the examination in a manner that would have been satisfactory to plaintiff. The fact that defendant had present in court so many physicians, charged by plaintiff with having an undue interest against him, was no sound objection, for the court could have refused to appoint any such to make the examination.

But it is urged the court was clothed with no power to enforce obedience of plaintiff, had such an order been made. Its power, in our judgment, was amply sufficient to cause obedience. The plaintiff would have been ordered by the court, by submitting his person to examination, to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice, and a contempt of the court's authority. He would have been subject to punishment as a recusant witness, who refused to answer proper questions propounded to him. Should such recusancy too long delay the court or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permenent injury, and withdrawn from the jury that part of the case. The plaintiff, by voluntarily withdrawing his claim for such injury, would have been relieved from the necessity of submitting to the examination, and pleadings, as for contempt, would have been suspended.

When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had an effect to elicit testimony from him as upon a cross-examination, the power of the court over him will be readily understood.

It is said that the examination would have subjected him to danger of his life, pain of body and indignity to his person. The reply to this is that it should not, and the court would have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperiling, in any degree, the life or health of the plaintiff. The use of anæsthetics, opiates, or drugs of any kind, should have been forbidden, if, indeed, it had been proposed, and it should have prescribed that he should have been subjected to no tests painful in their character. As to indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, provisions for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and and navy—all are subjected to rigid examination of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would no doubt have secured plaintiff from insult and indignity, but would have been a guaranty that nothing would have been attempted which would have endangered his life or health.

We have been able to find no case in which the question before us has been considered, and we

have been referred to no authority by counsel, that seems to have much application thereto. The courts have held in divorce cases, where the impotency of a party is in question, an examination may be ordered of the person alleged to be impotent. See 2 Bishop on Marriage and Divorce, sec. 590, *et seq.* and notes. The foundation of this rule is the difficulty of reaching the truth in any other way than by an examination of the person. The authorities referred to may be regarded as giving some support to our conclusion.

It is the practice of the courts of this state, sanctioned by more than one decision of this court, to permit plaintiffs, who sue for personal injuries, to exhibit to the jury their wounds or injured limbs, in order to show the extent of their disability or sufferings. If, for the purpose, the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case, and under proper circumstances, be required to do the same thing for a like purpose, upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men.

The court instructed the jury that they were authorized to regard plaintiff's refusal to submit to an examination as an admission that the examination, if made, would have been against his interest in the suit. It is argued that this familiar rule of law would alone relieve defendant from the effect of prejudice, on account of the refusal of plaintiff to be examined. This position is not correct. The defendant is left to depend upon the influence of the jury, which might or might not have been exercised, instead of having the truth disclosed by direct and positive evidence. The law will not require it to depend upon such inferences, when it can afford the means of producing competent evidence upon the question in issue.

Certain instructions given by the court on its own motion, and modifications of those given upon request of defendant, are complained of as being erroneous. The rule announced by the court in these instructions is substantially to this effect: That if the plaintiff was employed for the purpose of taking down and removing the bridge, and in doing this work a train was used on defendant's road, upon which plaintiff, in the course of his employment, and in obedience to the requirements of his superior, was riding at the time he sustained the injury, he was engaged in operating the road and the defendant, if the negligence and the care of plaintiff were found, was liable under the statute. The rule contemplates the cars of the train being operated for the purpose of removing the bridge. The purpose for which it is operated can not relieve defendant of liability, if the injury was sustained in its operation. If it was a part of plaintiff's employment to go upon the train, and he did so in the discharge of his duty, he is to be regarded as having been engaged in its operation, or his employment was connected with its operation. The rule of the instruction is correct, and is fully supported by Dippe v. C., R. I. & P. R. Co., 36 Iowa, 52. We discover no errors in the other instructions given to the jury.

Other objections urged by defendant's counsel relate to the findings of the jury, upon issues raised by the pleadings, which, it is claimed, are in conflict with the testimony. We are not required to pass upon these objections, as the judgment, for the error of the court in refusing to require plaintiff to submit to an examination, must be reversed. REVERSED.

EQUITY JURISDICTION—RIGHT OF WAY—PAROL AGREEMENT.

BLOOMSTEIN *ET AL.* v. CLEES BROTHERS.

Chancery Court at Nashville, Tenn., October Term, 1877.

Before HON. W. F. COOPER, Chancellor.

EQUITY will interfere, upon the ground of fraud and equitable estoppel, to prevent parties, by the assertion of a legal right, from interfering with the enjoyment of a right of way over their lands, and of a ferry at the end thereof, connecting with a way on the other side of the river purchased by the complainants and defendants, in pursuance of a parol agreement relating to the entire way and as part of the common enterprise, and, by contract in writing between them, made a permanent way "from and beyond the river," appurtenant to their several tracts of land and every part thereof, into whosoever hands the same might come, large sums of money having been spent by the complainants in the common enterprise, and the whole way, including the ferry, having been used six years before the interference of the defendants.

Gant, Demant & Gant, for complainants; *John Ruhm*, for defendants.

THE CHANCELLOR:

The demurrer to the bill is intended to raise the question, whether the right of way claimed by the complainants over the land of the defendants can be maintained if the agreement under which it is claimed was in parol.

The bill was filed on the 27th of August, 1877, by Bloomstein and the administrator and heirs of M. Anderson, deceased, against six brothers of the name of Clees. Bloomstein, Anderson, and the Clees brothers were the owners of large tracts of land in Bell's bend of the Cumberland river, on its north bank. The Clees brothers owned 1600 acres bounded by the river on the south and east. Bloomstein owned 600 acres bounded by the river on the south and west, and by the lands of the Clees brothers on the east, and Anderson owned 800 acres adjoining Bloomstein's land on the north, bounded by the river on the west and the Clees brothers on the east. These three parties owned all the land in the bottom of the bend, the dividing line between the lands of the Clees brothers on the east, and of Bloomstein and Anderson on the west, striking the bend near the centre, and no person north of them could cross the river in the bend without passing over the lands of one or more of them. By crossing the river and striking the Charlotte turnpike

at a distance of about three quarters of a mile, persons living on the bend could reach Nashville by that turnpike, the distance in all being some six miles, whereas the distance to Nashville by going out of the bend to the north was nearly sixteen miles, and over bad roads. Under these circumstances, "it was agreed" between Bloomstein, Anderson and the Clees brothers, in the spring of 1870, to open a road thirty feet wide to the river, on the line between the lands of Bloomstein and the Clees brothers, and part of the lands of Anderson, each adjoining proprietor giving one-half, establish a ferry, and buy the right of way south of the river to the Charlotte turnpike. Each of the contracting parties was to contribute to the expenses of making the road and ferry landing, the purchase of a ferry boat, and of the right of way south of the river, in the proportion of the number of acres in their respective farms, that is to say, the Clees brothers 16-30, Anderson 8-30, and Bloomstein 6-30. In pursuance of this agreement, the parties caused a survey and location of the road to be made north of the river, but, afterwards, at the solicitation of the defendants, and upon their undertaking to give the right of way over their lands, the road was changed so as to diverge eastwardly through the lands of the defendants by a route proposed by them. This change of route necessitated the building of a bridge on the defendant's land over a small stream. On the 7th of Nov., 1870, the parties purchased and took, a conveyance of the right of way on the south side of the river to the Charlotte turnpike. This conveyance also embodies an agreement between the parties touching the right of way, and is signed by them. The road was completed on both sides of the river, the ferry established, an order being obtained from the county court for this purpose, and the bridge built, the entire cost being about $3000, of which Bloomstein and Anderson paid their full quota. The defendants agreed to employ one of their tenants to run the ferry, and keep regular accounts, the parties to share the profits or losses in the proportion of their investments. The road was completed and the ferry established in 1871, and they were used by the parties and their tenants, and by "the neighbors and citizens and their tenants," and by the public generally, until July, 1877, when the defendants, without the knowledge of the complainants, procured an order from the county court discontinuing the public ferry, and have since refused to permit the complainants to use the road or ferry, while they use it for their own benefit.

The conveyance of the right of way on the south side of the river shows, upon its face, that the way was intended to be for the use of the parties from a ferry on the river to the Charlotte turnpike, although the fee to the land conveyed was vested in them. It also contains an agreement between Bloomstein, Anderson and the Clees brothers, in the following language: "But, as between and among the individuals composing the second party hereto, it is understood and agreed that said strip of land is to be held as an easement appurtenant to the tracts of land now owned by them respectively on the west side of the Cumberland river in said county, not to be separated from said lands by sale, devise, or bankruptcy; and that, upon either of the individuals of the second part ceasing to be owners of any interest in either of said tracts, from whatever cause his interest may cease, his right, title or interest in the above strip of land shall also cease, and be transferred to the party acquiring his interest in the tract to which the easement is appurtenant; nor shall the right or title of any of the parties of the second part, in the above strip of land, be liable to sale for his debts, either under execution or bankruptcy; but the said strip, if the full width of thirty feet, shall be held by said parties of the second part, as between themselves, for a general open way for a passage on foot, with horses, carts, wagons, and other carriages, and for all purposes to be the common property of them, their heirs and assigns, to be forever kept open as a common way, in, through, over, along, and across said strip of land, and to be used at any hour of the day or night, with the right to use the rock and other things, within the bounds of said strip in building and repairing said road; to be for the benefit and use of all the parties of the second part as long as they remain owners of said strip of land, and to follow said tracts and every part thereof into whosoever hands they may come, to furnish a way from and beyond the Cumberland river to and beyond the Charlotte turnpike, and the reverse, for all persons going from or coming to said tracts of land, or any part thereof."

This instrument, to which the defendants are parties, signing it by the name of Clees Brothers, expressly provides that the strip of land then bought is to be held, as between them and Bloomstein and Anderson, "for a general open way," appurtenant to their several tracts of land, "and every part thereof," into whosoever hands they may come, "and to furnish a way from and beyond the Cumberland river, for all persons going from or coming to said tracts of land, or any part thereof." By itself, this language might not necessarily imply more than a continuous right of way from the river to the turnpike, but, when taken in connection with the general agreement to establish the ferry and the road on the north side of the river, it probably imposes upon the defendants the duty of good faith touching the whole of the agreement. They can not, after joining the other parties in a common enterprise, be allowed to deprive those parties of any of those rights expressly stipulated for, or reap individual benefit at their expense. Community of interest produces community of duty, and it would be inequitable to permit one of the contracting parties to do anything to the prejudice of the others, in relation to the common property. Harrison v. Winston, 2 Tenn. Ch. 547, and cases cited. I am not, therefore, prepared to say that a written agreement of this character, touching a part of a connected right of way, would not be sufficient, under our statute of frauds, as an equitable estoppel to prevent the defendants from interfering with the right of way which the proof

may show to be necessary to the enjoyment of the right expressly conceded by the writing. Brown v. Berry, 6 Coldw. 102. Conceding the law to be strictly as claimed by the demurrer, it is precisely one of these cases of legal right which ought not to be determined except upon a final hearing on the facts. Brownsword v. Edwards, 2 Ves. 247.

But the legal right has been argued ably by the learned counsel on both sides, and I am prepared to state the conclusions to which that argument and an examination of the authorities has led me.

A right of way is an incorporeal hereditament, and is, doubtless, embraced in our statute of frauds, which prohibits an action "upon any contract for the sale of lands, tenements, and hereditaments," unless in writing. Harris v. Miller, Meigs, 158, and Mr. Meigs' note at the end of the case. In this view, a right of way may, of course, be acquired by seven years' adverse possession by user, under our statute of limitation, which include, in like manner, "lands. tenements and hereditaments." Code, §§ 2763, 2765; Jarnagin v. Mairs, 1 Hum. 479. But the period of user in this case was only about six years, and, therefore, insufficient to complete the bar. The complainants are, consequently, to stand upon the agreement as a parol license, coupled with an interest, working an equitable estoppel.

A mere license is, in its very nature, revocable, and confined to the parties between whom it is made. But a license loses its revocable character whenever it is coupled with the grant of an interest, or when an interest exists which depends upon, or can not be enjoyed without the aid of the license. Thomas v. Sorrel, Vaugh. 350; Wood v. Leadbitter, 13 M. & W. 844. So, if the license be executed. Pierrepont v. Barnard, 6 N. Y. 279. It is obvious, however, that to give an oral license, in regard to land, an effect which is denied to an oral contract would be virtually to abrogate the statute of frauds. At law, therefore, a license relating to land remains revocable, unless the interest with which it is coupled is legally granted; that is, where the statute of frauds applies by a written instrument. But it has long been settled, that equity may control the words of the statute, in order to prevent it from being used as a cover for the commission of the frauds which it was meant to suppress. It is the fraud which calls into play the jurisdiction of the court. Upon this ground rests the decisions which enforce the specific execution of parol contracts, touching land when there has been part performance. 1 Sto. Eq. Jur., § 330. In this state our judiciary, at an early day, concluded to adhere rigidly to the statute, and refused to follow the decisions mentioned. Patten v. McClure, Mant. & Yer. 333. In that very case, however, the court said that, if a man knowingly suffer another to purchase and expend money on land, under an erroneous opinion of title, without making his claim known, he would be estopped to set up his title against such person. This ruling has been repeated in subsequent cases. Morris v. Moore, 11 Humph. 434; Chester v. Greer, 5 Humph. 26. Another qualification of the earlier doctrine was made in Sneed v. Bradley, 4 Sneed, 301. It was there held, that a verbal contract for the sale of land was voidable, rather than void, and that the purchaser could maintain no action to recover back the consideration paid while the vendor was able, ready and willing to perform the agreement by making a conveyance. Of course, the converse would be true where suit was brought to recover the land. This opinion of one of our ablest judges was followed by another equally eminent judge, in Hilton v. Duncan, 1 Coldw. 313. It was either approved or followed in Roberts v. Francis, 2 Heisk. 128; Hamilton v. Gilbert, 2 Heisk. 680; Masson v. Swan, 6 Heisk. 451; McClure v. Harris, 7 Heisk. 379. It has, however, been recently repudiated, and the cases in which it was first announced directly overruled. Biggs v. Johnson, at Jackson, October term, 1876. The only exceptions which, under this latest decision, equity can make to the statute, are those resting on fraud, and there is a long line of English and American cases of equitable estoppel based on this ground.

The earliest case on this subject is that of Short v. Taylor, decided by Lord Somers, and cited in 2 Eq. Ca. Abr. 522. There, a person built a house, laying part of his foundation on the land of another, who, seeing this, did not forbid him, and, on the contrary, very much encouraged it; but when the house was built brought an action. Lord Somers granted an injunction, and said it was just and reasonable; for, being a nuisance, every continuance is a fresh nuisance, and so he would be perpetually liable to actions, which would be hard when encouraged by the party himself. A case still more in point is cited by Lord Loughborough, in Jackson v. Cator, 6 Ves. 690. "There was a case," says his Lordship, "against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground, and (afterwards) when the work (of the colliery) was begun, he said he would not give the road. The end of it was, that he was made sensible, I do not know whether by decree or not, that he was to give the road at a fair value." The case, then, before the court was where a lease had been granted, "reserving all trees and timber-like trees and pollards, and all plants and shrubs that are, or may be planted." The lessee having, with the knowledge and approval of the lessor, laid off part of the premises into a lawn, planting shrubberies, etc., the court enjoined the lessor from exercising his reserved rights by cutting down the timber in the lawn. The principle relied on was, that when a person has stood by, seeing the act done, or has consented to it, he shall not exercise his legal right in opposition to that permission; citing Stiles v. Cowper, 3 Atk. 692; East India Company v. Vincent, 2 Atk. 83; Hardcastle v. Shafts, 1 Anst. 184. Lord Eldon had the question before him in Dann v. Spurrier, 7 Ves. 235, and considered it with his usual cautious accuracy. "I fully subscribe," he says, "to the

doctrine of the cases that have been cited, that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement. Still, it must be put upon the party to prove the case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that sort of encouragement. It is upon the plaintiff to prove, not merely to raise a probable conjecture, but to show, upon highly probable grounds, a case of bad faith and bad conscience against the defendant." Lord Romilly, as master of the rolls, had the question before him repeatedly, and thus states the law: "The principle on which the defendants rely is one often recognized by this court, namely: that if one man stand by and encourage another, though but passively, to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the court will not permit any subsequent interference with it by him who formally promoted and encouraged those acts of which he now complains, or seeks to obtain the advantage. "This is is the rule," he adds, "laid down in Dann v. Spurrier, 7 Ves. 231; Powell v. Thomas, 6 Hare, 300, and many other cases, to which it is unnecessary to refer, for the principle is clear." Rochdale Canal Co. v. Sling, 16 Beav. 634; Duke of Devonshire v. Eglin, 14 Beav. 530; Duke of Beaufort v. Patrick, 17 Beav. 75; Mold v. Wheatcroft, 27 Beav. 510. Two of these cases involved the carrying of water across the land of another, and the last the running of a tramway and railroad across the land; and, in the cases in 16 and 17 Beavan, the bills were filed after recovery at law. To the same effect is Somersetshire Coal Canal Co. v. Harcourt, 2 De G. & J. 608. "A party," says Lord Cottenham, "may so encourage that which he complains of as a nuisance, as not only to preclude himself from complaining of it in equity, but to give the adverse party a right to the interposition of a court of equity in the event of his complaining of the nuisance at law." Williams v. Earl of Jersey, Cr. & Ph. 97.

The American authorities are in accord, so that the editors of the American Leading Cases feel themselves justified in thus condensing the result: "A writing is indispensably requisite under the provisions of the statute of frauds, whenever an estate or interest in land is to be affected, *unless the circumstances are such that a refusal to execute the agreement would operate as a fraud.* 2 Amer. Lead. Cas. 558. And the American cases have announced two conclusions in the matter of licenses, touching realty, which commend themselves to our sense of morality and justice. The first is that expressed by Judge Gibson in Swartz v. Swartz, 4 Barr, 358: "When the revocation of a license would operate as a fraud, a chancellor will turn the licensor into a trustee *ex maleficio* for the licensee, on principles analogous to those which apply when the owner of land stands by and allows another person to make improvements on it, under the belief that he will be allowed to reap the fruits of his labor and expenditures." The second, in which all the cases concur, is that a license, coupled with an interest, under which expenditures have been made with the expectation, induced by the licensor, of enjoyment, can not be withdrawn without tendering the money expended. Clement v. Durgin, 5 Maine, 9; Woodburg v. Parghley, 7 N. H. 237; Addison v. Hack, 2 Gill. 521; McKellip v. McIlhenny, 4 Watts. 317.

The only case we have on the subject tends in the same direction. Caldwell v. Scott, 10 Yer. 209. And the reservation, from a literal adhesion to the statute of frauds, made in Patten v. McClure, M. & Y. 333, and noticed above, is placed upon the principles of these decisions, namely, fraud and equitable estoppel.

The demurrer must be overruled.

IMPLIED WARRANTY ON SALES OF CHATTELS.

"The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. * * * So far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by *implied* warranty of quality." Benj. on Sales, sec. 644.

The application of the foregoing rule to sales of stock, municipal bonds, etc. (if it is applicable) is a matter of some interest to the profession. It is not easy to formulate a rule, but we would call attention to the following cases: Otis v. Cullom, 92 U. S. 447, was a case of this character. The city of Topeka issued bonds, some of which were purchased by a bank in that city. The bank sold some of these bonds to Otis, and received payment. Afterwards, it was decided that the bonds were invalid, the city having no authority to issue them. Whereupon, Otis sued the bank for the *consideration* paid by him for the bonds purchased as aforesaid. The court held: (1) that, as the bank gave no warranty, it can not be charged with a liability it did not assume; (2) that the vendor of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belonged to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this.

Glass v. Reed, 2 Dana (Ky.), 168, was a case where the plaintiff recovered a judgment, and sold and assigned it, the purchaser giving his note for the price agreed on. Afterwards, the defendant in the case had the judgment reversed. The purchaser attempted to resist payment of his note, because of the reversal of the judgment; but the court held there was no *implied warranty* that the judgment was irreversible.

The same principle has been applied in sales of patents for inventions. The rule there is, that a bare assignment of territory implies only that the assignor has a patent in due form, issued by the proper officers of the government, not that the patent is a *valid* one. Curtis on Patents, sec. 184; Benj. on Sales, sec. 632; Cansler v. Eaton, 2 Jones Eq. (N. C.) 499.

In cases where the note of a *third party* is ex-

changed for other property, there is no implied warranty that the maker of the note is *solvent*. Burges v. Chapin, 5 R. I. 225 and 230. The same rule applies in sales of stock in a corporation. Beeker v. Hasting, 15 Mich. 47; Renton v. Marryatt, 21 N. J. Eq. 123.

We take it for granted that these cases are decided upon the principle in the law of sales, that, generally, the law *implies* no warranty by the seller of the *quality* or *character* of the thing sold. The application of this principle, however, to franchises, like patents, and to municipal bonds, as in Otis v. Cullom, may be said to be new to the profession

W. C. Jr.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

FIRE INSURANCE—LOSS CAUSED BY PETROLEUM—CONDITION IN POLICY.—Action upon two policies of insurance against fire, issued by the defendants to the plaintiffs below, an express company, and covering goods, wares, and merchandise in their care for transportation, while on board cars, or other conveyances, including water and stage routes, embracing the entire routes of the company designated on a map specified. The policies, though differing in the sums insured, were alike in all other particulars, and contained the following clause: "It is a further condition of this insurance, that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils." By a collision between a disabled train containing petroleum and an express train, upon which the express company had goods, the petroleum was ignited and burned, and with it the goods. The petroleum did not belong to the company, and was not under its control. *Held*, that the loss of the goods was caused by the petroleum, and the insurance company was, under the clause in the policy, exempted from liability therefor. *Imperial Fire Ins. Co. v. Fargo.* In error to the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Justice STRONG.—Judgment reversed.

CORPORATIONS — EVIDENCE OF OWNERSHIP OF STOCK—EVIDENCE—RECORD OF BANKRUPT COURT.—Where the name of an individual appears in the stock-book of a corporation as stockholder, the *prima facie* presumption is, that he is the owner of the stock. In a case where there is nothing to rebut the presumption, and in an action against him as stockholder, the burden of proving that he is not such is cast upon the defendant. Hoagland v. Bell, 36 Barb. 56; Turnpike Road v. Van Ness, 2 Cranch, C. C. 451; Mudgett v. Morrell, 33 Cal. 29; Coffin v. Collins, 17 Me. 442: Merrill v. Walker, 24 Id. 237; Plank Road v. Rice, 7 Barb. 162. The receipt of dividends is conclusive evidence of ownership. Records of a bankrupt court in the Northern District of Illinois, authenticated in conformity with the provisions of the bankrupt act, held admissible in an action in the United States District Court in Maryland, by the assignee of a bankrupt corporation, against a stockholder, for contribution to pay the debts of the company. It is not necessary that the record of a judgment should be authenticated as provided by the act of Congress passed in pursuance of article 4, section 1, of the Federal constitution, to render it admissible in the courts of the United States; and the District Court of the United States, even out of the state composing the district, is to be regarded as a domestic and not a foreign court, and the records of the court may be proved by the certificate of the clerk, with the seal of the court, without the certificate of the judge. Adams v. Way, 33 Conn. 430; Michener v. Payson, 13 N. B. R. 50; Mason v. Lawrason, 1 Cranch, C. C. 190. *Turnbull v. Payson, Assignee.* In error to the Circuit Court of the United States for the District of Maryland. Opinion by Mr. Justice CLIFFORD.—Decree affirmed.

CONSTITUTIONALITY OF STATUTE PRESCRIBING MODE OF SERVICE OF PROCESS UPON A CORPORATION.—"The single question presented by this record is, whether a statute which prescribes a mode of service of judicial process upon the Cairo and Fulton Railroad Company different from that provided for in its charter, is void because it impairs the obligation of a contract. The regulation of the forms of administering justice by the courts is an incident of sovereignty. The surrender of this power is never to be presumed. Unless, therefore, it clearly appears to have been the intention of the legislature to limit its power of bringing this corporation before its judicial tribunals to the particular mode mentioned in the charter, the subsequent legislation upon that subject was not invalid. The provision of the charter relied upon is in these words: 'Process on said company shall be served on the president by leaving a copy to his address, at the principal office of the corporation, in the hands of any of its officers. The said corporation shall have power to establish a principal office at such place as they may see fit, and the same to change at pleasure.' As against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest. Here no such intention appears. The largest latitude is given the company in respect to the location of its principal office, and it can hardly be supposed that the legislature meant to deprive itself of the power of providing another mode of service if that specified was found to be inconvenient or unwise. The provision is one which evidently belongs to remedies against the corporation and not to the grant of rights. As to remedies, it has always been held that the legislative power of change may be exercised when it does not affect injuriously rights which have been secured.—Sturgis v. Crowninshield, 4 Wheat. 200." *Cairo and Fulton Railroad v. Hecht, et al.* In error to the Supreme Court of Arkansas. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

PROMISSORY NOTE — INDORSEMENT OF BY STRANGER BEFORE DELIVERY.—1. When a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. (a) If he puts his name in blank on the back of the note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. Schneider v. Schiffman, 20 Mo. 571; Irish v. Cutler, 31 Me. 537. (b) But if his indorsement was subsequent to the making of the note, and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note. (c) But if the note was intended for discount and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense, and

as such would clearly be entitled to the privileges which belong to such an indorser. 2. The presumption, where such an indorsement is made in blank, is, that the party is liable as maker or guarantor. 3. Where the party is held as a promisor or a second indorser, it is not necessary to allege or prove any other than the original consideration, but if it is attempted to hold him as guarantor, a distinct consideration must appear. *Good v. Martin.* In error to the Supreme Court of the Territory of Colorado. Opinion by Mr. Justice CLIFFORD. Judgment affirmed.

LIFE INSURANCE — CONDITION IN POLICY — SUICIDE—INSANITY—"JUST CLAIM."—1. By a clause of a policy of life insurance, which was conditioned to be void if the one whose life was insured should die by his own hand, it was provided that, before demanding payment in case of death, due and satisfactory proof should be made to the company of death and of the just claim of the assured. *Held*, that the "just claim" of the assured had reference to the title or claim to the policy, and not to the justness of the cause of action thereon, and proof that death had occurred by suicide did not render the proof unsatisfactory. The following instruction, as to the degree of insanity, which will excuse a suicide so as to make the company liable, *held* correct (following Life Ins. Co. v. Terry, 15 Wall. 580). "It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable; to do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity; and you will remember a great many jurors were excused from the panel because they thought the law was otherwise; therefore you will bear in mind that there is no presumption, *prima facie* or otherwise, that self-destruction arises from insanity; and if you believe from the evidence that the deceased, although excited, or angry, or disturbed in mind, formed a determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand, within the meaning of the policy. If the insured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery; that is, he did die by his own act. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, and when his reasoning faculties are so far impaired that he shall not be able to understand the moral character or the general nature, consequence, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not in the contemplation of the parties to the contract, and the insurer is liable." 3. If there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and indeed could not properly take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon. The judge may express his opinion on the subject, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so; but it is entirely in his discretion. Drakely v. Gregg, 8 Wall. 242; Hickman v. Jones, 9 Ib. 197; Barney v. Schneider, Ib. 248; Brown v. Lozalere, 44 Mo. 383; Roustong v. Railroad Co., 45 Ib. 236; McFarland v. Bellows, 49 Ib. 311; Consequa's Case, Peters' C. C. Rep. 225; McLanahan v. Ins. Co., 1 Pet. 170; Tracy v. Swartwout, 10 Pet. 80; Gaines v. Dunn, 14 Pet. 322; Mitchell v. Harmony, 13 How. 131; 9 Pet. 541; 2 Pet. 137. *Charter Oak Life Ins. Co. v. Rodel.* In error to the Circuit Court of the United States for the Eastern District of Missouri. Opinion by Mr. Justice BRADLEY. Judgment affirmed.

COMMON CARRIERS — DELIVERY TO CONNECTING CARRIER.—There is a complete delivery to a connecting carrier when the goods are deposited within the control of the carrier. The facts in this case were as follows: The G. railroad company, under a contract, occupied for the unloading of goods brought by it to D. a section of a depot owned by the M. railroad company, a connecting carrier. The goods were handled by the employees of the M. railroad company, clerks of the G. company merely keeping tally. When goods were designed for delivery to the M. company, they were placed in a specified part of the section, a transcript of their description was taken by the M. company's clerk from the way-bills of the G. company, and they were thereafter cared for by the M. company. *Held*, to constitute delivery to the M. company, and the G. company were not thereafter liable for their loss. If the liability of the succeeding carrier had attached, the liability of the defendant was discharged. Ransom v. Holland, 59 N. Y. R. 611; O'Neil v. N. Y. Central, 60 Ib. 138. The question, therefore, is, had the duty of the succeeding carrier commenced when the goods were burned? The liability of a carrier commences when the goods are delivered to him or his authorized agent for transportation and are accepted. Rogers v. Wheeler, 52 N. Y. 262; Grosvenor v. N. Y. Central, 59 Ib. 34. If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit amounts to notice and is a delivery. Merriam v. Hartford R. R. Co., 24 Conn. 354; Converse v. N. & N. Y. Tr. Co., 33 Ib. 166. The liability of the carrier is fixed by accepting the property to be transported, and the acceptance is complete whenever property thus comes into his possession with his assent. Illinois R. R. Co. v. Smyser, 38 Ill. 354. If the deposit of the goods is a mere accessory to the carriage, that is, if they are deposited for the purpose of being carried, without further orders, the responsibility of the carrier begins from the time they are received, but when they are subjected to further order of the owner, the case is otherwise. Ladere v. Griffith, 25 N. Y. 364; Blossom v. Griffin, 13 Ib. 569. Wade v. Wheeler, 47 Ib. 658; Michigan R. R. v. Schurlz, 7 Mich. 515. The same proposition is stated in a different form when it is said that the liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the succeeding carrier for further transportation, and acceptance by him. Merriam v. Hartford R. R. Co. and Converse v. N. & N. Y. Tr. Co., *supra*, are in point. In the latter case a railroad company and a steamboat company had a covered wharf in common, at their common terminus, used as a depot and a wharf, and it was the established usage for the steamboat company to land goods for the railroad, on the arrival of its boats in the night, upon a particular place in the depot, whence they were taken by the railroad company, at its convenience, for further transportation, both companies having equal possession of the depot. There was no evidence of an actual agreement that the goods deposited were in the possession of the railroad company, and the goods in question had not been in the manual possession of the railroad company when

they were destroyed by fire on the Sunday afternoon following their deposit on the previous night. It was held that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad should take it thence at their convenience. The delivery to the succeeding carrier was held to be complete, and a recovery against the first carrier for the loss of the goods was reversed. In Merriam v. Hartford, it was held that, if a common carrier agree that property intended for transportation by him may be deposited in a particular place without express notice to him, such deposit alone is a sufficient delivery; and that such an agreement may be shown by a constant practice and usage to receive property without special notice. *Pratt v. Grand Trunk R. R.* In error to the Circuit Court of the United States for the Eastern District of Michigan. Opinion by Mr. Justice HUNT. Judgment affirmed.

NOTES OF RECENT DECISIONS.

PURCHASE OF NOTES BY NATIONAL BANKS.—*First National Bank of Rochester v. Pierson.* Supreme Court of Minnesota, 16 Alb. L. J. 319. Opinion by CORNELL, J. The purchase of a promissory note by a national bank, for purposes of speculation, is *ultra vires*, and the bank acquires no title to and cannot recover on a note so purchased. Farmers and Mech. Bank v. Baldwin, 4 Cent. L. J. 119, followed.

MUNICIPAL CORPORATIONS—NO RECOVERY CAN BE HAD BY A CONTRACTOR ON A QUANTUM MERUIT.—*Addis v. City of Pittsburg.* Supreme Court of Pennsylvania, 4 W. N. 529. Opinion by SHARSWOOD, J. Where the law requires that all municipal work of a certain character shall be performed under contract let to the lowest and best bidder after due advertisement, no recovery can be had for work done in any other manner; and neither the municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law.

PROMISSORY NOTES—AUTHORITY OF PARTNER TO BIND THE FIRM FOR AN INDIVIDUAL DEBT.—*Riegel v. Irvin.* Supreme Court of Pennsylvania, 4 W. N. 537. PER CURIAM. A. B. C. & D., being in partnership under the firm name of "A. B. & Co.," became indebted to R. Subsequently I. purchased the interest of B. & C., and the firm continued under the name of "A. I. & D." A. paid the indebtedness to R. with a note drawn to the order of the old firm, adding in his own handwriting the endorsements of both firms. In an action by R. against A. I. & D., in which judgment by default was obtained against A. and D, *held*, in the absence of evidence of I.'s assent to the second indorsement, that R. could not recover against him.

EMINENT DOMAIN—MEASURE OF DAMAGES FOR LAND TAKEN—ADVANTAGES ACCRUING TO ADJOINING BUT SEPARATE TRACT BELONGING TO THE SAME OWNER, NOT AN ELEMENT OF COMPUTATION.—*Harrisburg & Potomac Railroad v. Moore.* Supreme Court of Pennsylvania, 4 W. N. 532. PER CURIAM.—In the computation of damages for land taken by a railroad company, the law has regard only to the tract of land through which the railroad is located, considered as a whole, and not to the person of the owner. Advantages accruing to an adjoining but separate tract, owned by the same person, but not cut by the railroad, can not be taken into consideration in assessing damages for the property actually taken.

LIABILITY OF CARRIERS OF ANIMALS.—*Mynard v. S. B. & N. Y. R. R.* New York Court of Appeals, 16 Alb. L. J. 471. Opinion by CHURCH, C. J. 1. Plaintiff shipped animals by railroad under a contract whereby he agreed to release and discharge the railroad company "from all claims, demands and liability of every kind whatsoever, for or on account of or connected with any damage or injury to or loss of said stock, or any portion thereof, from whatsoever cause arising." *Held*, that the contract did not release the company from liability for loss resulting from the negligence of its servants. 2. A carrier of animals is excused from liability for loss caused by the inherent tendencies or qualities of the animals, but beyond this the common-law liabilities exist against him the same as against the carrier of any other kind of property.

BOOK NOTICE.

A Digest of the Law of Trade-Marks, as Presented in the Reported Adjudications of the Courts of the United States, Great Britain, Ireland, Canada and France, from the earliest Period to the Present Time, etc. By CHARLES E. CODDINGTON, Counselor at Law. New York: Ward & Peloubet. 1878.

The law relating to trade-marks is decidedly modern, and the decisions of the courts few in number. Although the first reported case arose near the middle of the sixteenth century, for over a hundred and fifty years, only six cases are to be found reported. After the year 1805, the number of decisions reported during each decade, in Great Britain and the United States, is as follows: From 1805 to 1815, inclusive, 3; 1815 to 1825, 5; 1825 to 1835, 6; 1835 to 1845, 13; 1845 to 1855, 46; 1855 to 1865, 104; 1865 to 1875, 168. From this, it will be seen that, although the first trade-mark case was decided nearly three hundred years ago, nine-tenths of the decisions upon this topic have been made within the last thirty years, and more than half of them since the year 1865. Up to the date of the publication of this volume, there have been reported 170 cases decided in the Courts of Great Britain, Ireland and Canada, 178 in the Courts of the United States, and about an equal number in the French courts.

The ground on which the courts protect trade-marks is, that they will not permit a party to sell his own goods as the goods of another. Instead, it is now said, of being founded upon the theory of protection to the owner, it is supported to prevent frauds upon the public. If the use of any words, numerals or symbols is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such frauds, even though the person asking relief may not have the exclusive right to the use of such words or symbols. This is broadly the ground on which courts take jurisdiction in these cases. To this rule there are the limitations laid down in Delaware & Hudson Canal Co. v. Clark, 13 Wall. 311, where it is said that no one can claim protection for the exclusive use of a trade-mark, which would practically give him a monopoly in the sale of any goods, other than those produced or made by himself. Nor can a generic name, or a name merely descriptive of an article of trade, or of its qualities, ingredients or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.

A casual examination of the cases contained in this digest would show a conflict apparently unintelligible. The reason for this, is the ground stated in the previous paragraph, and the fact that what is proper for the court to order depends in each case upon its circumstances. This, and this only, explains why the court, in Newman v. Alvord, 51 N. Y. 189, extended its protection to the geographical name "Akron," applied to cement, while in Iron Co. v. Uhler, 75 Penn. St. 467, it refused its protection to the geographical name "Glendon," applied to iron; why it protected "Worcestershire" applied to sauce, in Rea v. Wolf, 15 Abb. Pr. 1, and "Glenfield," as applied to starch, in Wotherspoon v. Currie, 27 L. T. (N. S.) 393, while it

refused to protect "Lackawanna," as applied to coal, in Delaware & Hudson Co. v. Clark, 13 Wall. 31; why it protected the word "St. James," when applied to cigarettes, in Kinney v. Basch, and would not protect the word "Durham," when applied to tobacco, in Blackwell v. Wright. And this, also, makes a digest of the cases on this subject of great value, perhaps of more value to the practitioner than a treatise.

The volume contains over 500 pages, with a table of cases and a good index. The digest of French decisions, has been prepared by Francis Forbes, Esq., of the New York bar. An appendix contains the United States Statutes; the treaties of the United States concerning trade-marks, and the rules and forms of the United States patent office for their registration. The recent treaty between Great Britain and this country is, however, not given, having been signed since this volume went to press. Its provisions have been referred to in this journal, and will be found in 6 Cent. L. J. 20. The only criticism which we can make on the author's work is, that in several instances we find cases digested and referred to us as "not yet reported," which are to be found in previous volumes of this and other legal periodicals.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

ALTHOUGH THERE BE NO APPEARANCE for a defendant charged with crime, in this court, upon appeal or writ of error, the Supreme Court will examine the record in the cause. Opinion by SHERWOOD, C. J.—*State v. Smith.*

INDICTMENT—WRIT OF ERROR.—In criminal prosecutions, the state is not entitled to a writ of error in any case, and is only entitled to appeal in the manner and subject to the restrictions imposed by the statute. The State v. Newkirk, 149 Mo. 472, and The State v. Peck. 51 Mo. 111, are expressly overruled. Opinion by SHERWOOD, C. J.—*State v. Copeland*

TOWNSHIP ORGANIZATION — ROAD LAW. — The power of a road-overseer in the matter of taxation for road purposes, is limited by law, and by the amount of tax assessed by the township board of directors. The overseer has no power to incur debts for the township, or collect any additional amount either in work or money, beyond the amount so limited. Opinion by SHERWOOD, C. J.—*Ewell v. Virgil Township.*

DOWER — PARTIES — PRACTICE.— Where a widow brought suit for assignment and admeasurement of dower against a purchaser of part of the land, who acquired it from the husband and against her children as to the other portion in the same suit, it is too late, after verdict and judgment, on a motion in arrest, to raise the objection that the petitioner states two distinct causes of action, one of which is against the purchaser, and the other against the heirs. 2 Wag. Stat. 1015, § 1012; Daily v. Huston, 58 Mo. 361; Pomeroy v. Benton, 57 Mo. 531; Pac. R. R. Co. v. Watson, 61 Mo. 57. Nor does the fact that the widow married again before judgment entered, and that the same was entered in her name without joining the husband, affect the rights of defendant, or necessitate a reversal of the judgment. W. S., p. 1034, § 52; W. S., p. 1067, § 33. Opinion by SHERWOOD, C. J.—*Mead v. Brown.*

ACTION ON OFFICIAL BOND OF COAL OIL INSPECTOR FOR DAMAGES OCCASIONED BY EXPLOSION OF COAL OIL LAMP.—The statute requires the inspector's bond to be "conditioned for the faithful performance of the duties imposed by the act," and such bond is "for the use of all persons aggrieved by the acts or neglect of such inspector." The petition averred that the inspector in default and breach of the conditions of his official bond, branded 100 *empty* casks as "approved," that the casks belonged to Cobb & Co., who afterwards filled them with oil below test; that the inspector refused to inspect the same; that Cobb & Co. sold one of these casks to O'Connell, a grocer, who sold a gallon of the oil to the relator's family, and that a lamp filled therewith, exploded, causing the death of relator's wife, etc. To this petition a demurrer was sustained, we think, improperly. The petition states a good cause of action against the inspector and the sureties on his official bond, which is not affected by the fact that the manufacturers, Cobb & Co., were also liable under sec. 4 of the same chapter, and the judgment is reversed and the cause remanded. Opinion by SHERWOOD, C. J.—*The County Court of St. Louis County to the use of Jenks v. Fassett, et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" SAMUEL E. PERKINS, }
" WILLIAM E. NIBLACK, } Associate Justices.
" JAMES L. WORDEN, }
" GEORGE V. HOWK, }

INVALID JUDGMENT—RATIFICATION.—A judgment by confession entered without the knowledge or consent of the judgment-creditor, is invalid for all purposes, either as a lien, an estoppel, or a merger of the demand, unless ratified by such creditor. But if he afterwards accepts and ratifies it, it then becomes valid and attended with all the results incident to other judgments. Opinion by BIDDLE, J.—*Haggerty et al. v. Juday.*

DURESS—USURIOUS INTEREST—RECOUPMENT.—1. A certain degree of duress may excuse what would otherwise be a criminal act; a less degree may be cause for avoiding a contract. But where a creditor gave to his debtor, laboring under pecuniary embarrassment, the alternative of being sued in a legal mode for a debt, or giving his notes and mortgage for it, and the debtor so gave his notes and mortgage, there was neither duress nor fraud. 2. Where ten per cent. interest is charged for the use of money, there being no express contract, the excess over six per cent. may be recouped under the statute. Opinion by PERKINS, J. —*Snyder et al. v. Braden.*

WILL—DESCENT.—Palmer died in April, 1875, leaving a will which devised to Mary Prather, his grandchild, certain real estate. The devisee, Mary, died two months prior to the death of said Palmer, leaving a husband and son surviving her. The husband claimed one-third of the property, under sec. 13 of the statute of wills, and sec. 22 of the statute of descent. *Held*, the real estate never vested in Mary, but remained Palmer's until his death, when, by virtue of the will, it passed to the descendants of Mary Prather. As the title to the property never vested in Mary Prather, her husband could not take any part of it as her heir or husband, and as he was not a descendant from her, he could take no part under the will. Opinion by PERKINS, J.—*Prather v. Prather.*

USURIOUS INTEREST—RECOUPMENT.—The act of March 9th, 1861, repealed by implication so much of the act of March 7th, 1861, as prohibited the recoupment of usurious interest; but the prohibition, in the latter act, of a direct action for the recovery back of usurious interest voluntarily paid, has not been repealed, and is still a part of the law. And where an action

was brought to recover a balance on a promissory note, and the defendant answered that he had paid usurious interest, and demanded judgment by way of recoupment against the plaintiff, and the plaintiff then dismissed his action, *held*, that the defendant's counter-claim was no longer available under the law, and a judgment rendered thereon in his favor, against the plaintiff, was erroneous. In recoupment, a defendant can only use his claim in diminution of the plaintiff's cause of action, and can not, as in set-off, recover the excess of his claim over that of the plaintiff. Opinion by HOWK, J.—*Holcroft v. Mellott.*

MORTGAGE—PURCHASER FOR VALUABLE CONSIDERATION—EQUITY OF WIFE.—One who takes a mortgage to secure a pre-existing debt, the time of payment not being extended and no securities being surrendered, is not a purchaser for a valuable consideration, and such a mortgagee can not set up his mortgage as against parties having prior equities adverse to such mortgage. So far as the cases of Work v. Brayton, 5 Ind. 396, and Babcock v. Jordan, 24 Ind. 14, hold a different doctrine, they are overruled. In this case Richard Hill executed to Reid a note and mortgage for a precedent debt; Reid assigned the note and mortgage to Gray, who brought this action of foreclosure. The wife of Hill answered by way of counter-claim, that the mortgaged property was purchased by her husband with her money, and the deed taken in his name without her knowledge or consent, and that the equitable title was in her. The court held that Gray could not set up his mortgage against the prior equity of Mrs. Hill in the land. Opinion by WORDEN, J.—*Hill et al. v. Gray.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877—*Filed December* 18, 1877.

HON. JOHN WELCH, Chief Justice.
" WM. WHITE, }
" WM. J. GILMORE, }
" GEO. W. MCILVAINE, } Associate Justices.
" W. W. BOYNTON, }

NO APPEAL LIES FROM THE DECISON of the probate court setting aside or refusing to confirm a sale made by an assignee for the benefit of creditors. Opinion by WHITE, J.—*Miller et al. v. Assignees of the J. F. Sieberling Co.*

SUIT ON PROMISSORY NOTE—PLEADING.—A person, other than a payee, who brings an action against the maker, on a note payable to the order of the payee, and frames his petition under section 122 of the code, without giving a copy of an indorsement by the payee, is not entitled, under such petition, to the protection given to a *bona fide* indorsee for value and before maturity, although the note when offered in evidence appears with the name of the payee indorsed thereon. Judgment of the district court and the court of the common pleas reversed, and cause remanded to the common pleas for a new trial. Opinion by MCILVAINE, J.—*Tisen v. Hanford.*

ASSIGNMENT FOR BENEFIT OF CREDITORS—DOWER—1. The power given to an assignee in insolvency, by the 5th section of the act S. & S. 359, regulating the mode of administering assignments in trust for benefit of creditors, to sell and convey the real estate assigned, does not enable such assignee to extinguish by sale the inchoate right of dower of the wife of the assignor, in the assigned property. 2. A mortgagor of real estate, whose wife joined in the mortgage, releasing her dower interest in the property mortgaged, made, before the maturity of the mortgaged debt, an assignment, under the statute, of all his property in trust for the benefit of his creditors. In an action brought to foreclose the mortgage against the mortgage debtor and wife, the assignees in insolvency were made parties defendant, and pleaded in defense the fact of the assignments, their qualifications, the giving of the required notice to creditors, and that they were actively engaged in the execution of the trust. *Held*, that the facts alleged did not oust or affect the jurisdiction of the court. Opinion by BOYNTON, J.—*Dyer v. Garlough.*

LIEN OF JUDGMENT RENDERED IN FEDERAL COURT—LIMITATION.—1. A judgment rendered in the Circuit Court of the United States has the same lien on the lands of the debtor within the district that is given to a judgment of the state court within the the limit of its territorial jurisdiction. Sellers v. Corwin, 5 Ohio, 398, approved. 2. The words "lands and tenements of the debtor," as used in section 421 of the code, include a vested remainder held by the debtor under a legal title. 3. Where a judgment creditor, within the life of his judgment lien, commences an action to enforce his judgment against the lands of the debtor and to marshal the liens thereon, and, after decree, finding his lien and directing a sale of the property, subject, however, to a further order adjusting priorities and for distribution, is properly made a defendant in another action in which a sale is made, such judgment creditor does not lose his right to share in the distribution of the proceeds, by reason of the fact that, during the pendency of the last action, five years elapsed from the date of the last execution issued on the original judgment. Motion overruled. Opinion by MCILVAINE, J.—*Lawrence v. Belger,*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT, }
" SETH AMES, }
" MARCUS MORTON, }
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD, }
" AUGUSTUS L. SOULE, }

MOTION TO DISMISS.—A motion to dismiss, which relates to matter of form and not of substance, can not be made for the first time in the superior court on appeal from the district court. Stat. 1864, Ch. 250, § 2; Green v. Com., 111 Mass. 417; Com. v. Legassy, 113 Mass. 10. PER CURIAM.—*Com v. Lewis.*

EXEMPTION FROM ARREST OF WITNESS BEFORE LEGISLATIVE COMMITTEE.—A resident of another state, while in attendance as a witness in his own behalf, before a joint committee of the legislature, having petitioned for the allowance of a claim made by him against the commonwealth, and intending to return home without unnecessary delay, is exempt from arrest or civil process. Opinion by GRAY, C. J.—*Thompson's Case.*

CRIMINAL LAW—STATEMENTS MADE IN PRESENCE OF ACCUSED.—A and B were jointly indicted for the larcency of a watch. The defendants, after their arrest, were searched in the station. The watch was found upon A. The officer then, in the presence and hearing of B, asked A how he came by the watch; he replied, B gave it to him. B said nothing. *Held*, that B, while held in custody, had a right to keep silence as to the crime with which he was charged, and the circumstances connected with it, and was not called upon to reply to or contradict any statement made in his hearing. No inference against him was warranted by his failure to deny the truth of what A said to the officer. Com. v. Kenny, 12 Met. 239; Com. v. Walker, 13 Allen, 570. Opinion by SOULE, J.—*Com. v. McDermott.*

MOTION IN ARREST OF JUDGMENT—LEGALITY OF

COURT.—A motion in arrest of judgment, overruled in the court below, to which exception was taken, sets forth, "that it does not appear from the record that the complaint was heard and adjudged at a criminal term of the police court of Haverhill, or at a term of the court held for the transaction of criminal business." *Held*, that under the Stat. 1869, Ch. 385, requiring that police courts shall be held for the transaction of criminal business daily, and, Stat. 1877, Ch. 74, providing that the police court of Haverhill shall be held for civil business on the first and third Wednesdays of each month, etc., it appearing by the record that this case was tried on Wednesday, May 9, 1877, before said police court, a court required by law to be held on that day for criminal business, it is to be presumed that such a court was held in obedience to the requirement; and as this case was within the jurisdiction of such a court, and as the record recited that it was heard and adjudged in the police court of Haverhill on that day, it is to be presumed that it was then engaged in the transaction of criminal business. Opinion by ENDICOTT, J.—*Com. v. Brown.*

WARRANT—RESISTING OFFICER.—Where a building was occupied in separate tenements by A. and B., and a search warrant authorized an officer to enter and search the house occupied by B., the officer is not justified in entering the tenement occupied by A., and the latter has a right to resist his entry, using reasonable force; and the fact that the officer believed that the portion of A's tenement which he attempted to enter was in the occupation of B., can not affect the rights of A. Com. v. Leddy, 105 Mass. 381, distinguished. Opinion by MORTON, J.—*Com. v. Newton.*

LARCENY—EVIDENCE.—The defendant was indicted for larceny of a horse and two wagons. It appeared in evidence that he took and sold them without authority from the owner, absconded and kept the money obtained from the sale. The defense was that he was authorized by the owner to sell to any purchaser he could find, and on this point there was conflicting evidence. If he was authorized to sell, or honestly believed he had the right to take and sell the property, his subsequent flight and wrongful appropriation of the money, would not justify the jury in finding him guilty of larceny. But if he was not authorized, and the taking and selling was without right or color of right, then evidence of his subsequent conduct was competent to show the intent with which he took and sold the property. Opinion by ENDICOTT, J.—*Com. v. Hurd.*

AGENCY—INSTRUCTIONS—RATIFICATION.—The defendant sold for the plaintiff, under certain instructions, ten bonds of the U. P. R. R., and invested the proceeds in unregistered bonds of the I. C. R. R. The instructions contained in plaintiff's letters, expressed a decided wish to have his money put into registered bonds, and, after considering the subject at some length, and giving no definite instructions, he concluded by saying: "I shall feel under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates." *Held*, that the defendant was not limited to an investment of registered bonds, but that if he used his best judgment, acting fairly, prudently and in good faith, and made as safe an investment as he reasonably could, he would not be liable. *Held*, further, that it was for the jury to say whether the plaintiff, having learned the facts, by failing to object for two years or more, had ratified the sale and purchase. Opinion by ENDICOTT, J.—*Matthews v. Fuller.*

TITLE TO LAND ABUTTING ON TIDE-WATER—"SHORE."—By the law of Massachusetts, the proprietors of lands abutting on tide-water have a title in the shore or flats to low water-mark, where the tide does not ebb more than one hundred rods, and may cover upland and flats, either separately or together. The strict legal meaning of the word "shore," is doubtless the land between ordinary high water-mark and low water-mark; and such is its common meaning as a definition of a boundary, when used by itself and uncontrolled by other expressions in the deed or instrument of conveyance. But it may be shown, by a consideration of the whole instrument, and of monuments referred to therein, to have been used untechnically and without legal accuracy as importing low water-mark. Anc. Chart. 148; Storer v. Freeman, 6 Mass. 435; Jackson v. B. & W. R. R. Co., 1 Cush. 575, 579; Saltoustall v Long Wharf, 7 Cush. 195; Doane v. Wilcutt, 5 Gray, 328; Wiles v. Patch, 13 Gray, 254. Opinion by GRAY, C. J.—*Hathaway v. Wilson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

CONSTITUTIONAL LAW—TAXATION.—1. Sections 3 and 4 of "An act to regulate taxation on the change of boundry lines," approved March 3, 1873 (Laws of 1873, p. 267), are constitutional and valid. Sedgwick county v. Bunker, 16 Kansas, 498. 2. That clause of section 1, article 11 of the constitution, which provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation," discussed and construed. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*Commissioners of Ottawa County v. Nelson.*

ACTIONS AGAINST RECEIVERS—TAXES.—1. S., a county treasurer, filed his petition in the district court against a railroad company and B., the receiver of said company appointed by the circuit court of the United States, to recover the taxes levied upon said company for the year 1874. The petition alleged the appointment of the receiver and his possession and control of the road. Without, so far as the record discloses, the issue or service of any process, the company and receiver filed a joint answer in which they admit that a portion of the taxes are properly chargeable against the company, and consent that judgment may be rendered against them in this action for that amount, and also allege the appointment of the receiver by the United States circuit court, that he is not amenable to the process of the district court, and pray that as to him the suit may be dismissed. The district court decided that it had jurisdiction, and rendered judgment against the receiver. *Held*, no error. 2. While it may be conceded that a court appointing a receiver may draw to itself all controversies to which the receiver is a party, or which affect the property under his control, yet it does so only by direct action upon parties by way of injunction or proceedings as for contempt, and the appointment in no manner affects the ordinary jurisdiction of other tribunals. 3. An allegation, therefore, in an answer that the defendant is a receiver duly appointed by another court raises no question as to the jurisdiction of the court, in which the answer is filed. 4. Under the general tax law the valuation of real estate is fixed in the first place by the assessor and not by the owner, and may thereafter be changed by the board of equalization at a regular meeting of which legal and public notice is given, and, by the law of 1874, the assessment and valuation of railroad property was to be the same as that of other property. Opinion by BREWER, J. Affirmed. All the justices concurring *St. Joe & Denver City R. R. Co. v. Smith.*

IMMATERIAL ERRORS—INSTRUCTIONS—FELLOW-SERVANTS—EVIDENCE.—1. Where the court below commits errors, but, under the facts of the case, the

errors are immaterial, the judgment will not be reversed therefor. 2. Where the court below commits errors, as in charging the jury, but the errors are not saved by any exceptions, the judgment will not be reversed therefor. 3. The court below refused to give the following instructions to the jury, to wit: "30. In weighing the testimony offered on behalf of the parties, the jury will consider that the plaintiff is deeply interested in the result of the suit, and will view his testimony with proportionate suspicion. 34. That parties to suits, and their immediate relatives, are by the law held to be more or less biased against the adverse party, and, in this case, the credibility of the plaintiff, his father, brother and sister, are directly in issue with the plaintiff, as interested, and the other as biased witnesses against the defendant." There was no ground upon which to base these instructions, except the mere fact of interest of the plaintiff, who was a witness, and the mere fact of relationship to him of some of the other witnesses. *Held*, that the supreme court can not say that the court below erred in refusing to give these instructions; the supreme court can not say that, as *a matter of law*, the evidence of a party must be viewed with "suspicion," nor can the supreme court say that, as *a matter of law*, relatives must be "held to be more or less biased against the adverse party." That while it is the duty of the trial-court, if asked to do so, to instruct the jury that they may take into consideration the interest or relationship of any witness in weighing his testimony, yet the court may very properly leave it to the jury to say whether such witness is biased or prejudiced or not, and whether his testimony must be viewed with suspicion or not. 4. Where the plaintiff was injured by the fall of a derrick while in the employ of a railroad company as a laborer in building a culvert, and it was shown on the trial that O. superintended the work in building said culvert for said railroad company, that he hired the plaintiff and all the other laborers on the work, and had the power to hire and discharge such laborers whenever he thought proper to do so, and although the materials and machinery for the work were furnished to O. by other and superior agents of the railroad company, yet that it was the duty of O. to inspect such machinery, to see that it continued in good order, and to report to his superiors so that they might furnish him other machinery if it became defective, and while he was using said derrick it became defective and he knew it, but nevertheless continued the work and continued to use it, and in consequence of such defect it fell and injured the plaintiff while he was at work for the company, and under the orders of O., *held*, that the plaintiff and O. were not mere fellow-servants of the railroad company, but that O., with reference to the plaintiff, was a superior servant or agent and the representative of the railroad company, and that the company is responsible to the plaintiff for his said injuries caused by the negligence of O. 5. The court below did not err in admitting evidence as to what O. said, or what was said to him prior to said accident concerning the insufficiency of said derrick; such evidence was proper for the purpose of showing that O. knew that the derrick was unsafe. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*Kan. Pacific R. R. Co. v. Little.*

NOTES.

IF I am asked a question of common law, I should be ashamed if I could not immediately answer it; but if I am asked a question of statute law, I should be ashamed to answer it without referring to the statute book.—*Coke.*

A NEW YORK paper says the will of the rich man of the future will read, "To the respective attorneys of my children, I give my entire estate and worldly goods of all description. Personally to the children and my beloved wife I give all that remains." This instrument will satisfy the family and save the trouble of proving the old man insane.

HON. RICHMOND M. PEARSON, Chief Justice of the Supreme Court of North Carolina, while on his way from his home in Yadkin County, to attend at the sitting of the supreme court, was stricken with paralysis. He was conveyed to Winston, where he died on the night of the 5th inst., in the seventy-third year of his age. Mr. Pearson was elected a judge of the superior court of that state in 1836, and in 1848 was elected a judge of the supreme court. He served as associate justice for ten years, at the end of which period he was elected chief justice, a post which he continued to fill with increasing reputation to the day of his death. He leaves several children. One of them, Mr. Richmond Pearson, is a practising lawyer of this city.

ON Christmas day, at his residence, in St. Louis, died, Richard Soule, aged sixty-five. Mr. Soule, at the time of his death, was preparing for the printer the completed manuscript of a "Reference Manual for Lawyers," a volume of condensed legal bibliography, which will be of great service to the American bar. He was already well known to scholars by his "Dictionary of English Synonymes" and "Manual of English Pronunciation and Spelling," and by his labors upon Worcester's quarto dictionary, of which he was editor, under the supervision of Dr. Worcester, who was, at the time of its publication, too old to do active work. Mr. Soule was born in Duxbury, Mass., in 1812, and was graduated at Harvard College in 1832. While resident in Boston, he filled several public offices. A year or two ago he moved to St. Louis, where he has since resided with a son. He was personally known to many of our readers, and to most of them was well known through his works.

A WASHINGTON dispatch of the 6th inst., says: The United States Supreme Court will resume its session to-morrow, pursuant to holiday adjournment. The Credit Mobilier case will be argued before the full bench at some early date. The court, in view of the great importance of the Charleston city-tax cases, and of the fact that the bench was not full when they were argued about a month ago, has ordered them to be re-argued early next month. The question brought before the court by these cases is, whether a city or other municipal corporation under a state law can impose a tax upon its own obligations in the hands of non-residents. The city of Charleston levied two per cent. upon its six per cent. stock, and directed its treasurer to withhold the amount of tax from interest due. Messrs. Murray and Jenkins, one a resident of Germany, and the other of Maryland, brought suit in state courts to recover amounts thus withheld from them, and a majority of the South Carolina Supreme Court sustained the validity of the city's action. This decision was appealed to the supreme court on the ground that the law imposing such taxation was an act impairing the obligation of a contract, and therefore a violation of the federal constitution. The cases attract great attention in financial and business circles, as it is perceived that the acknowledgment by the supreme court of the power thus claimed, to treat municipal debts due to non-residents as property liable to local taxation, may lead in many instances to their being taxed out of existence; or, in other words, to repudiation under the form of taxation. In a similar case, namely, that of the Cleveland and Ashtabula Railroad Co. v. The State of Pennsylvania, five of nine members of the supreme court held that the state could not tax non-resident holders of railroad bonds, but the result of the pending cases is considered extremely doubtful